

This Opinion is Not a
Precedent of the TTAB

Mailed: December 7, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sugar Free Specialties, LLC

Serial No. 90706411

Kimberly A. Berger of Miller, Canfield, Paddock and Stone, PLC,
for Sugar Free Specialties, LLC.

William Verhosek, Trademark Examining Attorney, Law Office 114,
Laurie Kaufman, Managing Attorney.

Before Goodman, English and Hudis,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Sugar Free Specialties, LLC (“Applicant”) seeks registration on the Principal Register of the mark SMALL WINS (in standard characters) for “sweets and candies, namely, gummies and soft candies” in International Class 30.¹

The Trademark Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant’s SMALL WINS mark, as applied to the goods identified in the application, so resembles the standard

¹ Application Serial No. 90706411 was filed on May 12, 2021, under Trademark Act Section 1(b) of the, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

character mark BIG WIN for “candy,” in International Class 30,² registered on the Principal Register, as to be likely to cause confusion, mistake, or deception.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

I. Materials Attached to Applicant’s Brief

Applicant attached to its appeal brief the same exhibits it already submitted during the prosecution of the Application now on appeal. The Board discourages this practice. *In re Lorillard Licensing Co.*, 99 USPQ2d 1312, 1315 (TTAB 2011); *see also*, *In re SL&E Training Stable Inc.*, 88 USPQ2d 1216, 1220 n.9 (TTAB 2008) (attaching as exhibits to brief material already of record requires Board to determine whether attachments had been properly made of record and adds to the bulk of the file); *In re Thor Tech Inc.*, 85 USPQ2d 1474, 1475 n.3 (TTAB 2007) (attaching evidence from record to briefs is duplicative and is unnecessary). In this decision, we only cite to the materials Applicant and the Examining Attorney made of record during prosecution.

II. Likelihood of Confusion: Applicable Law and Analysis

We base our determination of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont*

² Registration No. 5570887 was issued on September 25, 2018. The BIG WIN mark is registered for other goods in Classes 16, 29 and 30. The refusal to register is based solely on the goods identified as “candy” in Class 30.

de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (the “*DuPont*” factors) *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In considering the evidence of record bearing on these factors, we keep in mind that “[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We have considered each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). However, varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). Moreover, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source, and to protect registrants from damage caused by registration of marks and services that are likely to cause confusion. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469

U.S. 189, 224 USPQ 327, 331 (1985); *see also Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

A. The Similarity or Dissimilarity of the Respective Goods, Channels of Trade and Prospective Consumers

1. Goods

We first turn to a comparison of the goods at issue, the second *DuPont* factor, *DuPont*, 177 USPQ at 567. In making our determination regarding the similarity of the goods, we must look to the goods as identified in the appealed Application and the cited Registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“[T]he question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application ... regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”)); *see also Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.”).

The BIG WIN registration uses the broad wording “candy,” which encompasses all goods of the type described, including Applicant’s narrower list of “sweets and candies, namely, gummies and soft candies.” *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018) (“[W]here the goods in an application or registration are broadly described, they are deemed to encompass ‘all the goods of the

nature and type described therein”) (citing *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). Thus, as Applicant concedes,³ its goods and Registrant’s goods are legally identical. *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1629 (TTAB 2018) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

The second *DuPont* factor, legally identical goods, supports a finding that confusion is likely.

2. Channels of Trade and Potential Customers

The third *DuPont* factor “considers ‘[t]he similarity or dissimilarity of established, likely-to-continue trade channels.’” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). The trade channels factor considers the modalities and means (e.g., print, media, store aisles or shelves, or online) by which the respective goods are marketed, see *In re Majestic Distilling*, 65 USPQ2d at 1204, sold or distributed in relative proximity, see *Kangol Ltd. v. Kangaroos U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992).

Where, as here, “the goods at issue are identical ..., absent restrictions in the application and registration [and here there are none], [the] goods ... are presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterra*

³ Applicant’s Brief, 6 TTABVUE 7, 16. Page references herein to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. References to the briefs on appeal refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

Inc., 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (cleaned up). Applicant, however, presented evidence and argument attempting to show that its goods and Registrant's goods are actually sold in different trade channels to disparate classes of consumers.⁴ This is irrelevant. Under the third *DuPont* factor, we must base our determination regarding the similarities or dissimilarities between channels of trade and classes of purchasers for the goods as they are identified in the Application at issue and the cited Registration. *Octocom Sys.*, 16 USPQ2d at 1787; *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987).

The third *DuPont* factor, a presumed overlap of trade channels and prospective consumers (because the goods are legally identical), supports a finding that confusion is likely.

B. Similarity or Dissimilarity of the Marks

1. Strength of the cited BIG WIN Mark

Before we evaluate the similarity or dissimilarity of the respective marks, we consider the strength of the cited BIG WIN mark. The strength of Registrant's mark affects the scope of protection to which it is entitled. Thus, we consider the conceptual strength of Registrant's mark, based on the nature of the mark itself, and its commercial strength, based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its

⁴ Applicant's Brief, 6 TTABVue 14-16; Request for Reconsideration of March 23, 2022 at TSDR 44-54, 57-63.

marketplace strength”). The commercial strength of the mark also is affected by the number and nature of third-party uses of similar marks for similar goods. *DuPont*, 177 USPQ at 567.

Applicant does not argue that Registrant’s BIG WIN mark is conceptually weak, nor has Applicant provided any evidence that Registrant’s mark is conceptually or commercially weak. All Applicant contends is that “[t]he Registrant’s mark on which the Examiner’s likelihood of confusion refusal is based is not a famous mark ..., nor has any evidence been submitted showing any alleged fame.”⁵

In an ex parte appeal such as this one, however, the owner of the cited registration is not a party, and the Examining Attorney was under no obligation to demonstrate consumers’ exposure to or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). So, the mark’s commercial strength, as usual, is treated as neutral. TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(d)(ix) (July 2022).

In sum, the conceptual and commercial strength of the cited BIG WIN mark are neutral considerations on this appeal. We thus afford the BIG WIN mark the typical scope of protection afforded a mark registered on the Principal Register pursuant to Trademark Act Section 7(b), 15 U.S.C. § 1057(b).

2. Comparison of the SMALL WINS and BIG WIN Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant’s and Registrant’s marks in their entirety, considering their appearance,

⁵ Applicant’s Brief, 6 TTABVUE 17-18.

sound, meaning and commercial impression. *DuPont*, 177 USPQ at 567; *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) 1746 (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019). Where, as here, the goods of Applicant and Registrant are legally identical, the degree of similarity between the marks required to support a finding that confusion is likely declines. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (citing *In re Viterro Inc.*, 101 USPQ2d at 1908)).

The test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). The parties’ marks “‘must be considered ... in light of the fallibility of memory” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). Therefore, the focus is on the recollection of the average consumer – here, the purchaser of candy – who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Further, “[n]o element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Labs. Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35 (CCPA 1974)).

On the other hand, different features may be analyzed to determine whether the marks are similar. *Price Candy Co. v. Gold Medal Candy Corp.*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955). That is, more or less weight may be given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161; *see also In re Nat'l Data*, 224 USPQ at 751 (“[I]n articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.”).

Appearance and Sound – Applicant asserts that the marks SMALL WINS and BIG WIN are visually and aurally different,⁶ but does not provide any explanation why. Notably, and repeatedly, Applicant concedes that the marks share the similar second term WIN or WINS.⁷ The Examining Attorney goes one step further, arguing that WIN and WINS are essentially identical in appearance and sound.⁸ The Examining Attorney does not make any argument regarding visual or aural similarities of the terms SMALL and BIG, nor any argument concerning the visual or aural similarities of the marks SMALL WINS and BIG WIN as a whole.

We note here that the plural WINS versus the singular WIN is an insufficient difference to distinguish the marks. *See, e.g., In re Belgrade Shoe*, 411 F.2d 1352, 162 USPQ 227, 227 (CCPA 1969) (there is no material difference, in a trademark sense, between singular and plural forms of a word); *In re Strategic Partners, Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012) (“Purchasers are unlikely to perceive any distinction in overall commercial impression between ANYWEARS and ANYWEAR”).

Thus, while the terms WINS and WIN are highly similar, the terms SMALL and BIG appear and sound different. We do note, on the other hand, that the two marks have “the same format, structure, and syntax.” *Midwestern Pet Foods*, 103 USPQ2d at 1440. That is, both marks consist of two one-syllable words. The second words in

⁶ Applicant’s Brief, 6 TTABVUE 9, 14.

⁷ Applicant’s Brief, 6 TTABVUE 8, 10, 12.

⁸ Examining Attorney’s Brief, 8 TTABVUE 6.

each mark are not materially different from one another. While the two first-word adjectives in each mark appear and sound different, overall the two marks have similar cadences and intonations. In their entireties, the marks SMALL WINS and BIG WIN are more similar than they are different in appearance and sound.

Meaning and Commercial Impression – Applicant and the Examining Attorney spend the majority of their arguments concentrating on the meanings and overall commercial impressions of the SMALL WINS and BIG WIN marks. We begin our analysis by setting out the definitions, from MERRIAM-WEBSTER, of the individual words from each mark that Applicant made of record:⁹

small

adjective

1a : having comparatively little size or slight dimensions

b : lowercase

2a : minor in influence, power, or rank

b : operating on a limited scale

3 : lacking in strength a small voice

4a : little or close to zero in an objectively measurable aspect (such as quantity)

b : made up of few or little units

5a : of little consequence : trivial

b : humble, modest

6 : limited in degree

7a : mean, petty

b : reduced to a humiliating position

small

adverb

1 : in or

2 : without force or loudness speak as small as you will— William Shakespeare

3 : in a small manner

⁹ Definitions of WIN, BIG and SMALL, Office Action Response of February 4, 2022 at TSDR 12-13, 24-25 and 44-45.

small

noun

1 : a part [smaller](#) and especially narrower than the remainder the small of the back

2a smalls plural : small-sized products

b smalls plural, chiefly British : [smallclothes](#) especially : [underwear](#)

big

adjective

1 : large in size a *big* house/room/field a *big* glass of soda [See More Examples](#) He is a *big* [*—tall and heavy*] man. She moved to a *bigger* city, the *biggest* city in the state The tent is *big* enough for 10 people. [*—there is enough space in the tent for 10 people*] A great big [*—very large, huge*] truck pulled up beside us. I can't understand her writing; she uses too many big words. [*—long words that many people don't know the meaning of*] [Hide](#)

2 : large in number or amount He led a *big* group through the museum. She was earning big money [*—a lot of money*] as a lawyer.

3 : involving or including many people, things, etc. She works for a *big* company. He organized a *big* advertising campaign. We had a *big* fund-raiser for the school.

1a : large or great in dimensions, bulk, or extent a big house also : large or great in quantity, number, or amount a big fleet

b : operating on a large scale big government

c of a letter : [capital sense 1](#)

2a : filled with or characterized by enthusiasm and interest I'm a big fan of soy foods but urge you to choose them wisely.—

c : [magnanimous](#), [generous](#) was big about it

d : outstandingly worthy or able a truly big man

e : [imposing](#), [pretentious](#) using big words also : marked by or given to boasting big talk

4 informal : more advanced in age : [older](#) my big brother : more mature His teachers all told me he was excited about riding the bus, feeling like a big boy now.— Laurie Frey

5 : [popular](#) soft drinks are very big in Mexico— Russ Leada brand

6a : of great force a big storm

big

noun

1 : an individual or organization of outstanding importance or power especially : [major league](#) —usually used in plural playing in the bigs

2 basketball, informal : a big player : a center or forward whose large size and strength are used to control play near the basket

But, the problem is that you MUST have guards. You can't play five bigs.— Martin Manley

win

verb

1 : to achieve victory in a fight, contest, game, etc. The boxer *won* the match by knockout. They *won* the battle/war. [See More Examples](#) She *won* the election. He won't give up until he's *won* the argument. Neither candidate *won* the debate. We tried our best, but you can't win them all. They played well, but they didn't *win*. The chances of *winning* are 1 in 100,000. It's not about *winning* or losing. It's about having fun. Okay, you win. [*—I agree to do what you want*] We'll go to the movies. [Hide](#)

2 : to get (something, such as a prize) by achieving victory in a fight, contest, game, etc. She *won* a tennis trophy. Her book *won* the Pulitzer Prize.

3 : to get (something) by effort She *won* praise for her hard work. His perseverance *won* him the job. [*—he got the job because of his perseverance*]

b : to induce to accept oneself in marriage was unable to win the woman he loved
4a : to obtain (something, such as ore, coal, or clay) by mining
b : to prepare (a vein or bed) for regular mining
c : to recover (metal) from ore
5 : to reach by expenditure of effort

intransitive verb

1 : to gain the victory in a contest : succeed
2 : to succeed in arriving at a place or a state

win

noun

Definition of *win* (Entry 2 of 2)

: victory especially : first place at the finish (as of a horse race)

It is at this juncture that we decide which term in the respective marks is dominant. When an arbitrary term as applied to the goods appears first in a mark, that generally is its prominent feature and thus normally is considered to be the dominant term of the mark. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). However, *Palm Bay* does not stand for the proposition that the first word is always the dominant term in a mark. Indeed, in that case, the Federal Circuit went on to explain that: “The presence of ... [the] strong distinctive term [VEUVE] as the first word in both parties’ marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of the [second] word ROYALE.” *Id.* That is not the case here where the second term in each mark, WINS or WIN, is the strong distinctive term as applied to the goods (candy), and the initial term in each mark, SMALL or BIG, is the more common and less distinctive term – each serving as an adjective to modify or describe the second term that follows. We therefore find that the term WINS or WIN in each mark is the dominant term.

Urging that the marks SMALL WINS and BIG WIN are not similar in connotation or commercial impression, Applicant argues for various alternatives in meaning given the number of different definitions for each term in the marks:

[A]lthough both marks arguably share a term, i.e., WIN and WINS, those terms can have different meanings. Both WIN and WINS can be used as either a noun or a verb. Depending on which way they are used, WIN and WINS, and therefore the marks, have different meanings. For example, WIN the noun is defined as a “victory.” ... WINS could be defined as the plural of the noun WIN, and therefore it could mean “victories.” However, WINS could alternatively be used as a verb, and instead be defined as one of the following: “to get possession of by effort or fortune”, “to make friendly or favorable to oneself or to one’s cause” or “to gain the victory in a contest.”

BIG WIN could therefore mean large victories. SMALL WINS, however, could have a number of different meanings. Likewise, BIG has several different definitions, including, “large in size”, “imposing, pretentious”, and “chief, preeminent.” ... SMALL likewise has several different definitions. SMALL can mean “having comparatively little size”, however, it can also mean “minor in influence, power or rank”, “lacking in strength”, “of little consequence” or “mean, petty.”

* * *

In the instant matter, BIG WIN could mean large victory, but it could also mean pretentious victories, chief victories or magnanimous victories. ... SMALL WINS could mean little victories, or it could mean petty victories, weak victories or inconsequential victories.¹⁰

The Examining Attorney posits a different view from Applicant, arguing that the marks are similar in meaning and commercial impression:

The additional terms of BIG in [R]egistrant’s mark and SMALL in [A]pplicant’s mark does not obviate the likelihood of confusion because it merely modifies the type of win rather than change the overall meaning.

* * *

[A]pplicant has primarily argued that ... the marks have different meanings as a noun or verb with the additional terms BIG and LITTLE added to the “win” and “wins,” respectively, i.e., anything from one large

¹⁰ Applicant’s Brief, 6 TTABVue 8-10.

and many victories or fortunate possessions to pretentious, magnanimous or petty victories. ... This difference, however, does not obviate the similarity between the marks because it not only suggests the significance of a win but may also indicate the size of the candy. ... The marks share the dominant term WIN(S) whether used as a noun or verb and that the additional terms BIG and SMALL are used adjectively to describe the “win(s).”

* * *

The only difference between the marks is the opposite meanings of BIG and SMALL. Upon closer view, the meanings of the marks are not that different. Despite the beginning antonyms, the meanings of the marks is merely the significance of the victory(ies). That is, the adjectives BIG and SMALL when used with the noun WIN(S) merely describes the degree of the win, and are not opposites in meaning, but perhaps apposite to the degree of the win. In other words, it is still a win or a victory, i.e., a win is a win, after all. If anything, the cited mark is the sum of applicant’s mark. For example, small wins equal a big win. Therefore, the use of the adjectives, BIG and SMALL when used in connection with WIN(S) creates a similar commercial impression as each connotes the significance of the win(s).

Moreover, it is unlikely that a negative connotation of a pretentious win or petty wins would be either the applicant’s or registrant’s intent when used in marketing of its goods to the public. Nor would consumers see it that way. In other words, consumers would not imagine purchasing and eating something that is sweet and delicious in a negative manner. The connotation of the marks would be viewed positively as in the attainment of sweet and delicious candy is a win. It is also very unlikely that consumers would attribute a negative meaning in one mark, e.g., petty wins in [A]pplicant’s mark, and then find something positive in the other mark, e.g., a large win in [R]egistrant’s mark. Rather, consumers are likely to recognize a similar connotation for both marks, e.g., that it is a victory or fortunate possession. Similarly, the entire[ty of the] marks suggest the fortunate possession of such small or big candies.¹¹

On balance, we find the Examining Attorney has the more sensible and persuasive argument. Consumers are more likely to attribute to the marks the positive meanings and commercial attributes offered by the Examining Attorney than the less-likely

¹¹ Examining Attorney’s Brief, 8 TTABVUE 6-8.

negative connotations and marketing traits ascribed to them by Applicant. We further find that Applicant's LITTLE WINS candies could be thought of by consumers as a line extension of Registrant's BIG WIN candies, offered by the same company. *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *7 (TTAB 2019) (“[Applicant’s mark] ... looks, sounds, and conveys the impression of being a line extension of ... [Registrant’s mark].”).

Applicant further argues that the commonality of the terms WIN and WINS does not mean the marks cannot be distinguished such that confusion will result. In support, Applicant points to several registered marks (USPTO database copies of which it made of record) for the same or similar goods and services which share a term and use antonyms, such as “big” and “small”, or “big” and “little”, to modify that term.¹² Notably, none of the third-party marks on which Applicant relies is registered for candy or edible goods of any kind.

Moreover, the Board previously has rejected the practice of relying upon so-called “pairs” or “sets” of registered marks for the purpose of allowing registration of yet another mark likely to cause confusion with a mark already registered on the Principal Register:

¹² Applicant’s Brief, 6 TTABVUE 12-14; Request for Reconsideration of March 23, 2022, at TSDR 12-43. From Applicant’s list, we do not consider the marks LITTLE BEAR or BIG WORLD, because they are merely the subject of filed applications. Third-party applications are evidence only of the fact that they have been filed, *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009), and have no other probative value, *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003).

The use of “sets of third-party registrations” ... relied on by [A]pplicant cannot justify the registration of another confusingly similar mark ..., because each case must be decided independently of prior decisions ..., [particularly when] the [third-party] marks involved are so different from the present case that, even if they were relevant, they would merely stand for the principle that the Office determines each case on its own merits.... The [third-party] “paired” ... marks ... [offered by Applicant] similarly are so different from the involved marks ... [at issue] as to have no probative value.

In re Embiid, 2021 USPQ2d 577, at *37-38 (TTAB 2021) (citing *n re Toshiba Med. Sys.*, 91 USPQ2d at 1272).

We find this appeal conceptually similar to *Procter & Gamble Co. v. Conway*, 419 F.2d 1332, 164 USPQ 301 (CCPA 1970), in which the court reversed the Board’s dismissal of the opposition to registration of the mark MISTER STAIN, finding the mark not likely to be confused with the opposer’s mark MR. CLEAN; both marks being used in connection with cleaning products. In reversing the Board, the court observed:

While here we have both aural and optical dissimilarity between “stain” and “clean,” such factors are not necessarily controlling on the issue of likelihood of confusion in the market place. A designation may well be likely to cause purchaser confusion as to the origin of goods because it conveys, as used, the same idea, or stimulates the same mental reaction, or in the ultimate has the same meaning. We think that this record discloses such a situation.

Procter & Gamble, 164 USPQ at 304.

Citigroup Inc. v. Capital City Bank Group, Inc., 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011), relied upon by Applicant, is distinguishable. The Board’s dismissal of the opposition was affirmed, in part, because the term common to the parties’ CAPITAL CITY BANK and CITIBANK marks, “City Bank,” both for banking and financial services, was weak due to its frequent use in the banking industry.

Here, there is no evidence that the term common to Applicant's and Registrant's marks, WINS or WIN, is conceptually or commercially weak.

Shen Mfg. Co. v. Ritz Hotel Ltd., 393 F.3d 1238, 73 USPQ2d 1350, 1354-57 (Fed. Cir. 2004), also relied upon by Applicant, is likewise distinguishable. The Federal Circuit there determined that the parties' marks containing the common term RITZ were sufficiently distinct to obviate confusion due to the presence of other terms or designs in the respective marks that served to create different commercial impressions when the marks were compared as a whole. Here, SMALL and BIG, when combined to form a part of each of the marks SMALL WINS and BIG WIN, even though are antonyms, are insufficient to differentiate the marks in meaning and overall commercial impression.

When the marks are compared in their entireties by the elements of appearance, sound, meaning and commercial impression, the second *DuPont* factor, the similarity of the marks, supports a finding the confusion is likely.

C. Sales Conditions

"The fourth *DuPont* factor considers '[t]he conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing.'" *Stone Lion*, 110 USPQ2d at 1162 (quoting *DuPont*, 177 USPQ at 567). Speaking only of its goods, and saying nothing about Registrant's goods, Applicant argues:

The purchasers of Applicant's goods are sophisticated purchasers, further undercutting any likelihood of confusion. The purchasers of Applicant's gourmet, sugar-free candy are seeking very specific and distinct goods

* * *

[More specifically,] purchasers of Applicant's gourmet, sugar-free candy are doing so to satisfy a specific need and thus ... exercise a greater degree of care when purchasing those specific goods. Applicant's candy is not the type which would be purchased on impulse and in fact, one would have to seek it out from specific sources in order to purchase it. Consumer confusion is thus unlikely.¹³

The trouble with Applicant's argument is that there are no limitations, in either the Application on appeal or the cited Registration, as to sales conditions or types consumers for Applicant's or Registrant's candy products. "In the absence of ... [such] limitations in ... [Applicant's or Registrant's] identifications of goods, we must presume that the goods [are marketed and sold] to all usual classes of consumers for such goods." *Centraz Indus., Inc. v. Spartan Chem. Co., Inc.*, 77 USPQ2d 1698, 1700 (TTAB 2006).

The record also does not support any elevated degree of care in purchasing candy. While Applicant provided no evidence regarding the cost of its goods, it did supply proof that Registrant's BIG WIN candies are offered for sale at prices between \$1.50 and \$6.00.¹⁴ Where "products [such as candy] are relatively inexpensive, comestible goods subject to frequent replacement ..., [p]urchasers of such products have been held to a lesser standard of purchasing care." *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984).

The fourth *DuPont* factor, sales conditions including the types of consumers who purchase Applicant's and Registrant's candy products, supports a finding that confusion is likely.

¹³ Applicant's Brief, 6 TTABVUE 16-17.

¹⁴ Request for Reconsideration of March 23, 2022, at TSDR 57-63.

D. Actual Confusion

The seventh *DuPont* factor is the “nature and extent of any actual confusion, while the eighth *DuPont* factor considers the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567. Applicant argues “[t]here are no known instances of actual confusion between Applicant’s mark and the Registration [sic] and the [E]xamining [A]ttorney has provided none.”¹⁵

Applicant’s argument regarding the absence of actual confusion is misplaced. To begin, “a showing of actual confusion is not necessary to establish a likelihood of confusion.” *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (citing *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 296 (Fed. Cir. 1983)). Moreover, “uncorroborated statements of no known instances of actual confusion are of little evidentiary value.” *In re Majestic Distilling*, 65 USPQ2d at 1205. We also have no evidence of whether the extent and circumstances of Applicant’s and Registrant’s uses of the respective marks was such as to give rise to meaningful opportunities for actual confusion to occur. *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026–27 (TTAB 1984). We therefore find the seventh and eighth *DuPont* factors, concerning actual confusion or the lack thereof, to be neutral.

¹⁵ Applicant’s Brief, 6 TTABVUE 18.

III. Balancing the *DuPont* Likelihood of Confusion Factors

Based on the elements of appearance, sound, meaning and commercial impression, the SMALL WINS and BIG WIN marks are more similar than different. Applicant's and Registrant's goods are legally identical, and are presumed to travel in overlapping trade channels to the same general class of purchasers. These factors support a finding that confusion is likely. The sales conditions including the types of consumers who purchase Applicant's and Registrant's candy products, also supports a finding that confusion is likely. The *DuPont* factors regarding actual confusion, or lack thereof, between Applicant's and Registrant's candy marks are neutral. We therefore find confusion is likely between Applicant's and Registrant's marks for the identified goods.

Decision:

The refusal to register Applicant's mark SMALL WINS under Trademark Act Section 2(d) is affirmed.